FILE COPY

Office Supreme Court, U.S.
FILED
AUG 12 1933
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),

Petitioner,

vs.

JOSEPHINE BOBO, as Administratrix of the Estate of Perry E. Bobo, Deceased,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

W. H. ORRICK,
R. W. PALMER,
Financial Center Building, San Francisco,
Attorneys for Petitioner.

Subject Index

		Page
1.	The question of the sufficiency of the evidence is properly raised under the California rules of practice.....	1
2.	The record is complete.....	3

Table of Authorities Cited

	Page
California Code of Civil Procedure, Section 629.....	3
California Code of Civil Procedure, Section 956.....	2
Carter v. Canty, 181 Cal. 749, 186 Pac. 346, at page 753	2
Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981	3
Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458.....	3
First National Bank of Monrovia v. Maryland Casualty Company, 162 Cal. 61, 121 Pac. 321.....	2
Rauer's Law & Collection Co. v. Templar Motors Co., et al., 69 Cal. App. 782, 232 Pac. 464.....	3
Smith v. Lightston, 182 Cal. 41, 186 Pac. 769.....	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),
Petitioner,

vs.

JOSEPHINE BOBO, as Administratrix of the Estate of Perry E. Bobo, Deceased,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(1) The question of the sufficiency of the evidence is properly raised under California rules of practice. All proceedings prior to the petition for writ of certiorari to this court were conducted in the state and not in the federal court. The state rules of practice are, therefore, the only ones applicable.

The rule of the federal courts referred to in respondent's brief (pp. 6, 7) that the right to attack

a judgment on the ground that the evidence is insufficient, is lost by failure of the petitioner to request a peremptory instruction, has never been adopted or followed in California. The sufficiency of the evidence to support a verdict may be reviewed on appeal in the absence of a motion for nonsuit, directed verdict or new trial. Section 956 of the *California Code of Civil Procedure* provides as follows:

> "Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

First National Bank of Monrovia v. Maryland Casualty Company, 162 Cal. 61, 121 Pac. 321, held, to quote from the syllabus:

> "A failure to object to evidence, or to move for a nonsuit, or to request specific findings, does not preclude an appellant from attacking a finding on the ground of insufficiency of the evidence to sustain it."

Carter v. Canty, 181 Cal. 749, 186 Pac. 346, at page 753:

> "An error in denying a motion for a nonsuit is not waived by a defendant solely by reason of the fact that after such denial he introduces evidence in defense."

See also:

Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458;
Smith v. Lightston, 182 Cal. 41; 186 Pac. 769;
Cortelyou v. Imperial Land Co., 166 Cal. 14; 134 Pac. 981;
Rauer's Law & Collection Co. v. Templar Motors Co. et al., 69 Cal. App. 782; 232 Pac. 464.

Section 629 of the California Code of Civil Procedure, relied on by the respondent (Br. p. 7), was added by the Legislature in 1923 (Stats. 1923, p. 750) and does not affect the above referred to rule.

(2) The record is complete. Respondent (Br. p. 13) complains that the record is incomplete. The exhibits (R. 118A to 118K) attached to the printed record, were made from the original exhibits. These original exhibits were incorporated in and filed with the original transcript of record with the Clerk of the Supreme Court of the United States pursuant to stipulation (R. p. 118).

Therefore, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
August 7, 1933.

W. H. ORRICK,
R. W. PALMER,
Attorneys for Petitioner.